

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** PCB GEAC 07-04 Unadopted Rules  
**SPONSOR(S):** Government Efficiency & Accountability Council and Homan  
**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Government Efficiency & Accountability Council	10 Y, 0 N	De La Paz	Cooper
1) _____	_____	_____	_____
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

**SUMMARY ANALYSIS**

PCB 07-04 creates the Open Government Act and is proposed legislation designed to implement recommendations of the Joint Administrative and Procedures Committee (JAPC) addressing issues uncovered in their review of state agency utilization of “unadopted” rules in carrying out agency function and responsibilities. Under the Administrative Procedure Act (APA), a “rule” is defined as an agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The definition does not include internal agency management or legal memoranda. An “unadopted rule” is an agency statement that meets the definition of “rule” but has not been adopted through the rulemaking process. JAPC staff recently surveyed the web sites of approximately 28 agencies and documented over 130 instances of agency policy statements that appeared to meet the definition of rule that were not adopted pursuant to the APA’s rulemaking requirements.

PCB 07-04 amends provisions of the APA designed to remove current incentives for agencies to rely on unadopted rules in the face of rule challenges, and to restructure these provisions to create incentives for agencies to initiate rulemaking. Among the major changes the bill makes to the APA are:

- to provide that once a challenge to an unadopted rule is filed, the agency must discontinue all reliance on the agency statement while the proceeding is pending until certain circumstances occur;
- to provide that agency action that determines the substantial interests of a party may not be based on a statement that violates the APA;
- to amend the attorney’s fees provisions to allow for the award of attorney’s fees and costs to persons challenging rules and proposed rules even though the agency commences rulemaking after a challenge is filed provided the administrative law judge finds that the agency knew or should have known that the agency statement was an unadopted rule.
- to raise current cap on attorney’s fees from \$15,000 to \$50,000.
- to provide procedures for JAPC to object to adopted rules and unadopted rules.

The fiscal impact of this bill is indeterminate since there is no way to measure the extent to which agencies will choose to defend an agency statement against a rule challenge in lieu of initiating rulemaking proceedings in order to avoid an adverse ruling.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty - this bill creates incentives for agencies to rely on rules which have been promulgated through the APA; a process which solicits comments and input from persons affected before a rule is enforced. Under the bill agencies would be less likely to continue to rely on unadopted rules which can have the same force of law without having the input of those affected.

### B. EFFECT OF PROPOSED CHANGES:

PCB 07-04 is proposed legislation designed to implement recommendations of the Joint Administrative and Procedures Committee (JAPC) addressing issues uncovered in their review of state agency utilization of "unadopted" rules in carrying out agency function and responsibilities. For several months prior to the 2006 regular session, and on a continuing basis thereafter, the JAPC has been tracking and evaluating the scope of state agency utilization of agency policy statements that meet the definition of *rule* given in s. 120.52 (15) F. S., of the Administrative Procedure Act (APA), but which have not been adopted through the rulemaking process provided in s. 120.54, F.S.

JAPC issued two reports on the subject of unadopted rules which led to the recommendations included in this PCB.<sup>1</sup> The first report (Initial JAPC Report) was issued in February 2006 and recommended no amendments for the 2006 session until further analysis was completed to ascertain the reasons behind agency action regarding unadopted rules. The second report, containing recommendations, was issued in February 2007 as a supplement to the initial report (Supplemental JAPC Report).

The APA establishes the procedures by which state agencies must adopt the administrative agency rules necessary to carry out their duties and responsibilities. The Initial JAPC Report describes the purpose and objective of the APA as follows:

Florida's 1974 Administrative Procedure Act (APA) was intended to combat the perception of "phantom government," the idea that agency policies were neither widely known nor consistently applied. Important goals of the new Act were to provide public notice of agency policy, encourage public participation in the formulation of that policy, and ensure legislative oversight of delegated authority. Agency policy was to be expressed through rules adopted pursuant to the rulemaking requirements of the Act.

Florida Statute s. 120.52(15) of the APA defines a state agency rule as follows:

(15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

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<sup>1</sup> *Report of Unadopted Rules*, JAPC, February 2006; *Supplement to Report of Unadopted Rules*, JAPC, February 2007.

Section 120.536(1) F.S., expresses the standard for exercising agency rulemaking authority.

(1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

There have been some court decisions that have expanded the discretion of agencies to determine whether their own policy statements are in fact "rules" requiring adoption under the APA.<sup>2</sup> In contrast, s. 120.54 (1)(a), F.S., provides a clear indication of the Legislature's directive that agencies must utilize the APA's rulemaking process stating that "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule . . . shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable." The statute also creates a presumption that rulemaking is feasible and practicable and sets forth express criteria for determining when it is neither.<sup>3</sup> The burden to prove that rulemaking is not feasible or practicable rests with the agency, however, an agency can effectively negate the feasibility presumption by simply initiating rulemaking.

An "unadopted rule" is an agency statement that meets the definition of "rule" but has not been adopted through the rulemaking process. In determining whether an agency policy statement is a rule, courts will evaluate the effect of the statement rather than the agency's own characterization of the statement.<sup>4</sup> In the period between the Initial JAPC Report and the Supplemental JAPC, joint committee staff surveyed the web sites of approximately 28 agencies and documented over 130 instances of agency policy statements that appeared to meet the definition of rule that were not adopted pursuant to the APA's rulemaking requirements.<sup>5</sup>

Section 120.56(4), F.S., allows any person substantially affected by an agency statement to challenge the statement and seek an administrative determination of whether the statement violates s. 120.54(1)(a), F.S. Section 120.57(1)(e), F.S., also referred to as the "prove up" provision, requires that in the hearings for such challenges the agency must demonstrate that the unadopted rule:

1. Is within its statutory or constitutional authority and responsibilities;
2. Does not enlarge, modify, or contravene the law implemented;
3. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;
4. Is not arbitrary or capricious.
5. Is not being applied without due notice; and

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<sup>2</sup> *Department of Revenue v. Novoa*, 745 So.2d 378 (Fla. 1<sup>st</sup> DCA 1999); *Department of Highway Safety and Motor Vehicles v. Schluter*, 705 So.2d 81 (Fla. 1<sup>st</sup> DCA 1998); *McDonald v. Department of Banking and Finance*, 346 So.2d 569 (Fla. 1<sup>st</sup> DCA 1977).

<sup>3</sup> S. 120.54(1)(a)1 provides: Rulemaking shall be presumed feasible unless the agency proves that: a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement. S. 120.54(1)(a)2. provides: Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that: a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of party based on individual circumstances.

<sup>4</sup> *Department of Administration, Division of Personnel, v. Harvey*, 356 So.2d 323 (Fla. 1<sup>st</sup> DCA 1977).

<sup>5</sup> *Supplement to Report of Unadopted Rules*, JAPC, February 2007, at 3.

6. Does not impose excessive regulatory costs.<sup>6</sup>

Current law allows an agency to continue the application of a challenged unadopted rule to the substantially affected challenger until the administrative law judge enters a final order that the statement violates section 120.54(1), F.S. Also, once the agency initiates rulemaking in response to an unadopted rule challenge, it acts essentially as a complete defense, and the agency may avoid an adverse ruling simply by commencing belated rulemaking procedures. In short, even if the agency is enforcing an unadopted rule that clearly violates the rulemaking requirements of s.120.54, F.S., the agency is not penalized for its failure to initiate rulemaking prior to the statement's application to substantially affected persons.

PCB 07-04 amends s. 120.56(4), F.S., to provide that once a challenge to an unadopted rule is filed, the agency must discontinue all reliance on the agency statement or a substantially similar statement until:

1. The rule challenge is dismissed for any reason other than the initiation of rulemaking;
2. The agency adopts its statement as a rule;
3. The final order finds that the petitioner failed to prove that the statement meets the definition of a rule; or
4. The final order finds that rulemaking is not feasible or practicable.

These four circumstances would serve to suspend or defer the general prohibition on agency reliance on the agency statement unless or until any of the enumerated circumstances occurs. With respect to the first circumstance listed above, if a rule challenge is dismissed because the agency initiated rulemaking, the unadopted rule would be treated as a proposed rule and be governed by the rulemaking provisions of the APA. Moreover, a dismissal based the initiation of rulemaking is expressly carved out the circumstances in which an agency may continue to rely on an unadopted rule. According to the Supplemental JAPC Report, “[t]he immediate relief from application of an agency statement alleged to meet the definition of a rule would provide an incentive for citizens affected by such statements to file challenges, and an incentive for agencies to adopt policy statements as rules before they are applied, consistent with the intent of the [APA].”<sup>7</sup>

The PCB also authorizes an administrative law judge to permit an agency's continued reliance upon a challenged unadopted rule during the proceeding upon a determination that the inability of the agency to apply the statement would constitute an immediate danger to the public health, safety or welfare.

PCB 07-04 amends s. 120.57(1)(e), F.S., to repeal the current “prove-up” provisions and provide that agency action that determines the substantial interests of a party may not be based on a statement that violates section 120.54(1)(a). The PCB's amendment of this section is intended as a reformulation of the “prove up” provision codified in 1991 amendments to the Act as an alternative method of establishing agency policy.<sup>8</sup> The Supplemental JAPC Report explains the context and effect of their recommended amendment to the provision as follows:

Early case law granted agencies the option of engaging in “policy by adjudication” but described such a “prove up” option as an incentive to rulemaking, as it was thought that development of policy through the adjudicatory process would be burdensome to agencies. However, when the precursor to section 120.57(1)(e) was enacted in 1991, instead of requiring an agency to prove up the facts at issue in the course of adjudication as an alternative to adopting policy statements by rule, the statute permitted an agency to prove up the agency policy contained in an unadopted statement. Under the recommended legislation, an agency may still forego rulemaking as long as the agency proves up the facts or conduct at issue in each adjudicatory proceeding, rather than proving up the unadopted policy itself. The agency would be required to demonstrate

<sup>6</sup> See s. 120.57,(1)(e), F.S., for further detail with respect to each element listed.

<sup>7</sup> Supplemental JAPC Report, at 4.

<sup>8</sup> See Initial JAPC Report at 2 – 7.

that a given fact situation was governed by existing rules or statutes. These suggested amendments would end the inconsistency that has existed between sections 120.56(4) and 120.57(1)(e) while also recognizing the ability of an agency to apply “policy by adjudication,” so long as it does not rely upon policy statements meeting the definition of a rule.

PCB 07-04 amends the attorney’s fees provisions of s. 120.595(4), F.S., to allow for the award of attorney’s fees and costs to persons challenging rules and proposed rules even if the agency commences rulemaking after a challenge is filed. Under the bill, if the agency initiates rulemaking during a rule challenge proceeding and the statements becomes effective, the administrative law judge may award attorney’s fees up through the date the agency initiated rulemaking provided the administrative law judge finds that the agency knew or should have known that the agency statement was an unadopted rule.

Under current law, an agency may avoid the award of attorney’s fees simply by initiating the rulemaking process when a challenge is filed or anytime thereafter prior to the final order of the administrative law judge. The approach taken in the PCB is designed to create an incentive for agencies to initiate rulemaking at an earlier stage of rule challenge proceedings. The bill also raises the current cap for attorney’s fees from \$15,000 to \$50,000. The PCB further clarifies that attorney’s fees are also recoverable from challenges to existing emergency rules.

Section 120.545, F.S., provides instruction and direction for JAPC to review agency rules in order to monitor each agency’s proper implementation of their delegated authority. This section provides that the JAPC may certify an objection to an agency rule with the agency and notify the Speaker of the House and the President of the Senate. The current section of statute, however, was not drafted to specifically address the issue of unadopted rules. PCB 07-04 amends this section to provide procedures particularly addressing adopted rules, unadopted rules, and objections relating to a statement of regulatory cost.

PCB 07-04 amends s. 120.54, F.S., relating to rulemaking hearings to expressly provide that when the proceeding is one which is to come before a regulatory board, other than a board comprised of the Governor and Cabinet, the board itself must conduct the public hearing and may not delegate that responsibility to staff unless those who requested the public hearing give their consent.

C. SECTION DIRECTORY:

**Section 1.** Provides a title for the act.

**Section 2.** Amends s. 120.52, F.S., to provides a definition of “unadopted rule.”

**Section 3.** Amends s. 120.54, F.S., removing provisions relating to hearings with respect to unadopted rules.

**Section 4.** Amends s. 120.545, F.S., relating to procedures for the Joint Administrative and Procedures Committee to object to adopted and unadopted rules.

**Section 5.** Amends s. 120.56, F.S., to generally prohibit an agency’s continued reliance on an unadopted rule while a rule challenge is pending.

**Section 6.** Amends s. 120.57, F.S., to prohibit the enforcement of unadopted rules when an agency fails to prove that rulemaking was not feasible or practicable.

**Section 7.** Amends s. 120.595, F.S., relating to the award of attorney’s fees.

**Sections 8 & 9.** Amending s. 120.55, FS, and s.120.55, F.S., as amended by chapter 2006-82, Laws of Florida, to conform a cross-reference.

**Section 10.** Providing an effective date.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The fiscal impact of this bill is indeterminate since there is no way to measure the extent to which agencies will choose to defend an agency statement against a rule challenge in lieu of initiating rulemaking proceedings in order to avoid an adverse ruling. Agencies utilizing ruling making procedures under the APA for statements that meet the definition of rule will not be fiscally impacted by this bill. Agencies that are not using rulemaking prior to enforcement of agency statements that are "rules" will incur an indeterminate fiscal impact to the extent they seek to defend the challenged statement rather than initiate rulemaking before a challenge is filed.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

None.